

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MAUERN JEROME ASHFORD,

Petitioner,

v.

ORDER
08-CV-393S

SUPERINTENDENT, Auburn Correctional
Facility,

Respondent.

1. On November 10, 2009, Respondent Superintendent, Auburn Correctional Facility, filed a Motion to Dismiss Petitioner's habeas corpus petition as time-barred pursuant to 28 U.S.C. § 2244(d)(1)(D). The Honorable Hugh B. Scott, United States Magistrate Judge, directed Petitioner to respond to Respondent's motion by December 11, 2009.

2. Petitioner failed to file a response as directed. On December 21, 2009, Petitioner moved for an extension of time to respond to the motion. By Order dated December 28, 2009, Judge Scott granted Petitioner's request and directed Petitioner to respond to the Motion to Dismiss on or before January 15, 2010.

3. Petitioner again failed to submit a response as directed. Consequently, on April 26, 2010, Judge Scott issued a Report and Recommendation and recommended that the petition for a writ of habeas corpus be dismissed pursuant to Rule 41 of the Federal Rules of Civil Procedure due to Petitioner's failure to prosecute his claims. On April 28, 2010, Respondent filed a letter requesting that this Court adopt the Report and Recommendation.

4. By letter dated May 3, 2010, Petitioner objected to Judge Scott's Report and

Recommendation.¹ In light of Petitioner's objection to the Report and Recommendation, this Court cannot conclude that he is failing to prosecute his case. He is, however, failing to comply with the orders of this Court and he may face dismissal of this case, if he continues to do so. See FED. R. CIV. P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision. . . operates as an adjudication on the merits.") In addition, this Court must set aside Judge Scott's Report and Recommendation because Petitioner has not received the required warnings prior to dismissal for failure to prosecute. See Brown v. General Nutrition Cos., Inc., 356 Fed.Appx. 482, 486, 2009 WL 4822994 (2d Cir. 2009) (unpublished) (remanding case to the district court and vacating its dismissal because plaintiffs did not receive notice that "further delay" would result in dismissal for failure to prosecute) (quoting United States ex rel. Drake v. Norden Sys., Inc., 375 F.3d 248, 255 (2d Cir. 2004)).

5. This Court will permit Petitioner a third and final opportunity to file and serve his response to Respondent's Motion to Dismiss. Petitioner is warned, however, that further delay or failure to respond as directed may result in this Court dismissing this case for failure to prosecute. See Link v. Wabash Railroad Co., 370 U.S. 626, 630-32, 82 S.Ct. 1386, 8 L.Ed. 2d 734 (1962); Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 42 (2d Cir. 1982) (noting that, where the defendant has not moved under Rule 41(b), a federal district court may nonetheless dismiss a case *sua sponte* for failure to prosecute).

IT HEREBY IS ORDERED, that Judge Scott's Report and Recommendation (Docket

¹ In this letter, Petitioner relies on "the reasons stated in the Objections" and his "motion in opposition to the respondent's motion to dismiss the petition" as grounds for this Court to set aside Judge Scott's Report and Recommendation. The docket, however, does not contain either submission that Petitioner references.

No. 20) is set aside in light of Petitioner's recent activity in this case.

FURTHER, that this case is referred back to Judge Scott for the issuance of a final scheduling order on Respondent's Motion to Dismiss (Docket No. 10) to include the requisite warnings regarding failure to respond.

SO ORDERED.

Dated: August 8, 2010
Buffalo, New York

/s/William M Skretny
WILLIAM M. SKRETNY
Chief Judge
United States District Court